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No. _____

In the

Supreme Court of the United States

October Term, 1993

DOUGLAS JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the United States Court of Appeals for the Eighth Circuit has rendered a decision in conflict with other Circuit Courts of Appeals, and has departed from the acceptable and usual course of judicial proceedings by rendering a decision in conflict with its own precedents, so as to call for an exercise of this Court's power of supervision as to whether the use of the preponderance of the evidence standard at the sentencing hearing afforded sufficient due process protection to Petitioner where the sentencing judge's findings of fact had a dramatic quantitative impact upon the sentence Petitioner received.

II.

Whether the United States Court of Appeals for the Eighth Circuit has rendered a decision in conflict with this Court's decision in Maryland v. Buie, 494 U.S. 325 (1990), where the instant protective sweep: did not follow in an-home arrest; took much longer than necessary to effectuate the arrest and depart the premises; and was not based upon "specific and articulable facts" supporting the agents' fear of attack from individuals within the premises.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DOUGLAS JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Douglas Johnson, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in United States v. Douglas Johnson, No. 93-2071 (8th Cir. Nov. 29, 1993).

OPINIONS BELOW

The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc of the Court of Appeals for the Eighth Circuit, dated February 7, 1994, is reprinted in the appendix hereto, at p. A32, infra.

The Opinion of the Court of Appeals for the Eighth Circuit is unpublished, and is reprinted in the appendix hereto, at p. A1, infra.

The Judgment of the United States District Court for the District of Minnesota in Case Number 4-92-143 (Murphy, J.) is reprinted in the appendix hereto, at p. A5, infra. The Sentencing Memorandum of the United States District Court for the District of Minnesota is also reprinted in the appendix hereto, at p. A10, infra.

JURISDICTION

The jurisdiction of the United States District Court for the District of Minnesota was invoked by indictment pursuant to 18 U.S.C. §3231. The jurisdiction of the United States Court of Appeals for the Eighth Circuit was invoked under 28 U.S.C. §1291 and Rules 3 and 4 of the Federal Rules of Appellate Procedure.

The United States Court of Appeals for the Eighth Circuit affirmed Petitioner's conviction and sentence in an unpublished opinion filed November 29, 1993. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied on February 7, 1994.

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Eighth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition primarily involves Sections 2K2.1 and 6A1.3 of the United States Sentencing Guidelines, which are reprinted in full in the appendix hereto at pp. A15 and A21, respectively. Petitioner contends that Judge Murphy's use of the cross-reference provision of the Guidelines (§2K2.1)

implicates the Fifth and Sixth Amendments of the United States Constitution. U.S. Const. Amend. V & VI.

Further, a motion was brought pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure to suppress evidence obtained during an illegal search of the premises at 828 Tyler Street, Gary, Indiana. Fed. R. Crim. P. 12(b). Petitioner argued at the motion hearing that the search of the premises violated the Fourth Amendment to the United States Constitution, and that the evidence obtained during the search should be suppressed. U.S. Const. Amend. IV. The District Court for the District of Minnesota denied Petitioner's motion to suppress, and the evidence obtained as a result of the search was submitted to the jury.

On April 16, 1993, Judge Murphy sentenced Petitioner pursuant to 18 U.S.C. §2113(a) & (d), 18 U.S.C. §924(c), 18 U.S.C. §922(a), 18 U.S.C. §3583, 18 U.S.C. §3663, and 18 U.S.C. §3013.

STATEMENT OF THE CASE

On July 12, 1992 at approximately 3:30 a.m., the State Bank of Redwood ("Bank") was burgled and robbed. A silent alarm at the Bank alerted personnel at the Redwood Falls Law Enforcement Center, and Officer Derek Woodford of the Redwood Falls Police Department was dispatched to the Bank. During his investigation of the crime scene, Officer Woodward was shot by an individual whom he was chasing on foot. (TR. II-125).

The Redwood Falls Police Department, Redwood Falls County Sheriff's Department, Minnesota Bureau of Criminal Apprehension, Federal Bureau of Investigation, and various other law enforcement agencies were involved in the ensuing investigation. (TR. II-81, II-96, III-390).

The FBI's investigation of the matter led it to Gary, Indiana, and on July 17, 1992, Petitioner was arrested at his

residence at 828 Tyler Street in Gary. (TR. III-375). At approximately 11:20 a.m. on the date of his arrest, Petitioner spoke (via telephone) with Agent Karen Pertuso. (Orders A-9). Shortly after that conversation, nine FBI agents went out to arrest Petitioner. As they approached 828 Tyler Street, the agents dispersed as follows: two agents set up positions on the north side of the home; two agents set up positions on the south side of the home; three agents were in the rear of the home; and two approached from the front. The record reveals that the agents were heavily armed with riot guns and automatic weapons.

When the agents announced themselves, Petitioner came to the front door and walked out onto the porch. He was neither armed nor completely dressed, and he peacefully submitted himself to arrest. (TR. III-384). Immediately upon arresting him, however, Agent Dunn and the other agents proceeded to conduct a "protective sweep" of the premises at 828 Tyler Street. (TR. III-456). As a result of the search of Petitioner's residence, the Government obtained evidence which was introduced at trial, including one camera bag, one full box of PMC Ammunition (9 mm), one empty box of PMC Ammunition (9 mm), one Indiana ID for "Derek Johnson", one 9 mm magazine, photographs of residence, and gun cleaning equipment.

A jury trial was conducted from November 16, 1992 through November 23, 1992 in the United States District Court for the District of Minnesota. The jury rendered a guilty verdict on November 23, 1992, finding Petitioner guilty on the following counts:

Count	Nature of Offense	Title and Section
One	Aggravated Bank Burglary	18 U.S.C. §2113(a)(D)

Two	Use of a firearm during a crime of violence.	18 U.S.C. §924(c)
Three	Felon in possession of a firearm.	18 U.S.C. §922(g)

On April 16, 1993, the District Court sentenced Petitioner (based upon the Federal Sentencing Guidelines) to be committed to the custody of the Attorney General as follows:

Count One:	292 months
Count Two:	60 months
Count Three:	120 months

The Court ordered Count Two to run consecutively with Counts One and Three, and Count Three to run concurrently with Count One.

Petitioner is presently serving his sentence in the Eaglewood Federal Correctional Institution in Littleton, Colorado.

REASONS FOR GRANTING WRIT OF CERTIORARI

I.

This Court should determine the appropriate burden of proof regarding "relevant conduct" under the United States Sentencing Guidelines, especially where, as here, the Sentencing Judge's Factual Findings have a dramatic quantitative impact upon the sentence.

On April 16, 1993, Petitioner was sentenced to serve a total of 352 months in the custody of the Bureau of Prisons: 292 months as and for Count I, 60 months (to be served consecutively) as and for Count II. Additionally, he was sentenced to 120 months as and for Count III, to be served concurrently with the sentence for Count I.

Petitioner's sentence was based upon various Presentence Investigation Reports prepared by the United States Probation Department. On December 29, 1992, a Presentence Investigation Report was prepared by the U.S. Probation Office. Thereafter, on January 21, 1993, and February 1, 1993, revised Presentence Investigation Reports were prepared. The February 1 Report, along with a March 1, 1993 Addendum, formed the foundation for Judge Murphy's sentence. (The relevant paragraphs of the February 1, 1993 Report are reprinted at A23, infra.) Had Judge Murphy not applied the cross-reference provisions U.S.S.G. §2K2.1(c)(1), the applicable offense level would have been 31 rather than 35, giving Petitioner a guideline range of 188 to 235 months (plus 60 months pursuant to 18 U.S.C. §924(c)), for a sentence that would have been between 9 and 11 years shorter than that he is currently serving.

It is settled law that "[t]he safeguards of due process are not rendered unavailable simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). "[T]he sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." Gardner v. Florida, 430 U.S. 349, 358 (1977).

Due process concerns have been raised with respect to the post-verdict fact-finding to be undertaken by the sentencing judge under the United States Sentencing Guidelines. According to the Guidelines:

> When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the Court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the Court may consider relevant information...provided that the information has sufficient indicia of reliability to support its probable accuracy.

U.S.S.G. §6A1.3, reprinted at A21, infra. The drafters of the Guidelines did not adopt a particular standard of proof for relevant conduct, and this Court has not addressed the issue since the Guidelines took effect in November, 1987. Kinder v. United States, 946 F.2d 362 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 2290, 2292 (1992) (White, J., dissenting).

In a related context, however, this Court has considered a due process challenge to a Pennsylvania statute that prescribed a mandatory minimum sentence of five (5) years imprisonment if the sentencing judge found by a preponderance of the evidence that the defendant "visibly possessed a firearm." McMillan v. Pennsylvania, 477 U.S. 79, 81 (1986). Writing for this Court, (then) Justice Rehnquist observed that the statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty." Id. at 87-88.[1] He added that the Pennsylvania statute "has not transformed against its will a sentencing factor into an 'element' of some hypothetical 'offense.'" Id. at 90. In upholding the Pennsylvania statute, however, the McMillan Court made it clear that it could not lay down a "bright line"

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[1] By contrast, factual findings under the Federal Guidelines will often expose the criminal defendant to greater punishment.

test, and that each case must be determined upon its own circumstances. Id. at 91 ("[T]he law is full of situations in which differences of degree produce different results.")

More recently, this Court declined to grant certiorari to review the Fifth Circuit's decision in Kinder v. United States, 946 F.2d 362 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 2290 (1992).[2] Dissenting from the denial of certiorari, Justice White first observed that, while most of the Circuits required the sentencing judge to apply the preponderance of the evidence standard in making factual findings, others had intimated that a higher standard would be required in certain situations. Id. at ___, 112 S.Ct. at 2291. Justice White then stated:

> In a marginal case, such a difference in the standard of review could well prove dispositive...The burden of proof at sentencing proceedings is an issue of daily importance to the district courts, with implications for all sentencing findings, whether they be the base offense level, specific offense characteristics, or any adjustments thereto, or even those facts found to warrant departure altogether. The resolution of disputed matters at sentencing obviously has serious implications for both the defendant and the Government, as it controls the length of sentence actually to be imposed.

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[2] In Kinder, the Petitioner had argued that the Fifth Circuit violated his due process rights by relying on evidence of relevant conduct that lacked "sufficient indicia of reliability" to raise his base offense level under the Guidelines. Id. at ___, 112 S.Ct. at 2291.

Id. at ___, 112 S.Ct. at 2292.

For their part, the Circuit Courts of Appeals have been unable to reach an abiding consensus with respect to the burden of proof issue. While, initially, the Circuit Courts determined that the "preponderance of the evidence" standard sufficiently addressed the due process rights of the criminal defendant, see, e.g., United States v. Ehret, 885 F.2d 441 (8th Cir. 1989), several Circuit Courts have since cautioned that a stricter burden of proof may be required under certain circumstances. See, e.g., United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990); United States v. Schuster, 948 F.2d 313 (7th Cir. 1991); United States v. Townley, 929 F.2d 365 (8th Cir. 1991); United States v. St. Julian, 922 F.2d 563 (10th Cir. 1990).[3]

The concern that the preponderance of the evidence standard fails to afford adequate due process to the criminal defendant undergirds the decision of the Third Circuit Court of Appeals in United States v. Kikumura, 918 F.2d 1084 (3rd Cir. 1990). The Petitioner in Kikumura was convicted of several explosive and passport charges, for which the Sentencing Guidelines prescribed 27 to 33 months in prison. The evidence produced at the sentencing hearing, however, indicated that the Petitioner had manufactured three homemade bombs and, in fact, was a major terrorist for the Japanese Red Army. Id. at 1089. On this basis, the District Court made an "upward departure" from the Sentencing Guidelines and imposed a thirty (30) year prison sentence. Id.

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[3] "[I]t is far from clear that [the preponderance of the evidence standard] comports with Supreme Court doctrine on the constitutionally required burden of proof in criminal proceedings or with the Court's general due process jurisprudence." Note, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U.Chi.L.Rev. 1387, 1394 (1990).

The Third Circuit vacated the Judgment of Sentence and remanded the case to the District Court for sentencing, holding that under the circumstances there presented, a clear and convincing standard of proof was required. Id. at 1102. With respect to the evidentiary standard, the Kikumura Court stated:

> Though long recognized as a practical necessity, real offense sentencing can create the potential for significant unfairness. This is so because every factual consideration deemed relevant for sentencing purposes must be established through a collateral, post-verdict adjudication at which the applicable procedural protections are significantly lower than those applicable at the trial itself.

Id. at 1099. According to the Court, these divergent levels of protection reflect the judgment "that a convicted criminal is entitled to less process than a presumptively innocent criminal defendant," as well as the concern that "'over-burdened trial courts would be greatly disserved by the time-consuming hearings' that more intensive procedural protections would require." Id. at 1100.

> Here, however, we are dealing with findings that would increase Kikumura's sentence from about 30 months to 30 years -- the equivalent of a 22-level increase in his offense level. This is perhaps the most dramatic example imaginable of a sentencing hearing that functions as "a tail which wags the dog of the substantive offense." In this extreme context, we believe, a court cannot reflexively apply the truncated procedures

> that are perfectly adequate for all the more mundane, familiar sentencing determinations.

Id. at 1101. (internal citations omitted).

Since Kikumura, several other Circuits have considered the due process concerns raised by the use of the preponderance standard at the sentencing hearing. In United States v. Concepcion, 983 F.2d 369, 390 (2nd Cir. 1992), one of the co-defendants asserted that his due process rights had been violated by the sentencing judge's use of the preponderance standard. Using that standard, the judge made findings of fact that triggered the cross-reference provision (§2K2.1(c)), resulting in a 22-step increase in the co-defendant's offense level. The Second Circuit declined to address the due process argument, however, as it observed that "[t]he district court found that the government had established [the relevant conduct] by 'clear and convincing proof'." Id.

Concurring in Concepcion, Judge Newman deemed it worth amplifying "the extraordinary course that the Sentencing Commission and our case law have set us on in the hope that some revision may receive serious consideration." Id. at 394. Judge Newman remarked, inter alia, that the Sentencing Commission's decision to price relevant conduct at exactly the same level of severity as convicted conduct was "entirely unjustified." Id.

> Though the Supreme Court had ruled, prior to the Guidelines, that a sentencing court may consider misconduct of a defendant, whether or not resulting in a conviction, it was an open policy choice for the Commission whether to price such conduct

> the same as convicted conduct or at some lesser level of severity.

Id. (internal citations omitted). Judge Newman then addressed the standard of proof question:

> We have accepted the "preponderance of the evidence" standard, although a strong argument can be made that the "clear and convincing evidence" standard should be used, at least for substantial enhancements. The "preponderance of the evidence" standard was originally made applicable to sentencing decisions in the pre-Guidelines regime. It is highly questionable whether it should have been imported so readily into the Guidelines regime, particularly in light of the Commission's decision to price unconvicted conduct as severely as convicted conduct. The case for a higher standard is even stronger where, as here, the Guidelines require the "finding [of unconvicted conduct] to be a tail which wags the dog of the substantive offense [of conviction]."

Id. (internal citations omitted). See also United States v. Mergerson, 995 F.2d 1285, 1292 (5th Cir. 1993) ("[T]here may be certain cases where a sentencing fact is a 'tail that wags the dog of the substantive offense,' and might arguably require a finding beyond a reasonable doubt."); United States v. Billingsley, 978 F.2d 861, 866 (5th Cir. 1992) (citing Kikumura).

In United States v. Trujillo, 959 F.2d 1377, 1381 (7th Cir. 1992), the Seventh Circuit rejected the appellant's contention

that he was entitled to a jury finding as to the amount of drugs that he possessed "because the amount plays a crucial role in sentencing under the Guidelines." According to Trujillo, "[t]his court has held consistently that the quantity of drugs involved in a narcotics case does not constitute a substantive element of the drug offense." Id. (citations omitted). Nonetheless, the Trujillo Court acknowledged that "[t]here are constitutional limits to a legislature's ability to define an offense and the factors enhancing punishment for its violation." Id. "[S]o long as the enhancement factor has not been 'tailored to...be a tail which wags the dog of the substantive offense,'" however, "the Constitution is not violated." Id. (citing McMillan, 477 U.S. at 85). With regard to the quantity of drugs factor, the Court stated that "[i]t is a question of fact to be determined by a preponderance of the evidence at sentencing." Id. at 1382.

> The disparity between the sentence for the crimes charged in the indictment and the sentence received by the defendant as a result of enhancement provisions must be extreme before due process demands increased scrutiny at sentencing. The sentencing-hearing tail must wag the substantive-offense dog in order for the preponderance of the evidence standard to violate due process.

Id. at 1382; see also, United States v. Schuster, 948 F.2d 313, 315 (7th Cir. 1991) (citing Kikumura with approval). The Court went on to find that the resultant sentencing increase of 4.5 years, while not insignificant, "is not so extreme or dramatic as to invoke Kikumura scrutiny." Id.

In United States v. Townley, 929 F.2d 365 (8th Cir. 1991), the Eighth Circuit suggested that the preponderance of

the evidence standard may not be adequate in every case. Considering the "unusual nature of the sentencing determination"[4] in that case, Judge Bright stated:

> Under such circumstances, due process conceivably could require more than a mere preponderance. At the very least, McMillan allows for the possibility that the preponderance standard the Court approved for garden variety sentencing determinations may fail to comport with due process where, as here, a sentence enhancement factor becomes "a tail which wags the dog of the substantive offense." 477 U.S. at 88, 106 S.Ct. at 2417.

Id. at 369. Referring to Kikumura, 918 F.2d 1084 (3d Cir. 1990), the Townley Court stated, "We do not foreclose the possibility that in an exceptional case, such as this one, the clear and convincing standard adopted by our sister circuit might apply." Id. at 370. See also United States v. Wilson, 992 F.2d 156, 159 (8th Cir. 1993) (Heaney, J., dissenting); United States v. Fleming, 1993 U.S. App. LEXIS 27186 (8th Cir. Oct. 21, 1993) (Heaney, J., dissenting); United States v. St. Julian, 922 F.2d 563, 569 n.1 (10th Cir. 1990) ("If the difference between the guideline range and the departure sentence is great, the trial court should consider the implications of that disparity in determining the appropriate standard of proof for the facts considered in sentencing."); United States v. Lam Kwong-Wah, 966 F.2d 682, 687 (D.C. Cir. 1992).

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[4] Townley involved an 18-level increase in the defendant's base offense level and a seven-fold increase in the permissible sentencing range. Id.

In United States v. Restrepo, 946 F.2d 654, 661 n.12 (9th Cir. 1991) (en banc), cert. denied, 503 U.S. ___, 112 S.Ct. 1564 (1992), the Ninth Circuit likewise suggested that certain scenarios under the Guidelines threaten "an unacceptable sentencing effect under only a preponderance of the evidence standard." Under the facts at bar, however, the majority refused to impose a heightened burden of proof upon the Government:

> The district court's finding at sentencing that Restrepo was responsible for an additional 65.83 grams of cocaine raised Restrepo's offense level from fourteen to eighteen, potentially increasing his sentence by a minimum of twelve months, or a maximum of twenty months, depending on his criminal history category. This finding simply is not "a tail which wags the dog of the substantive offense." Whether such an offending tail will yet arise under the Guidelines in this circuit is a question for the future.

Id. at 661 (citing McMillan, 477 U.S. at 88) (footnote omitted).

As Judge Tang stated in concurrence, "the severity of penal consequences associated with a sentencing factor may in some cases tip the balance toward requiring heightened procedural protections in determining the applicability of that factor." Id. at 661. (Tang, J., concurring). The Judge further remarked:

> Of course, the Supreme Court has "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact,' the State must

> prove that fact beyond a reasonable doubt." But the quantitative effect of a sentencing factor does remain relevant in deciding what procedural safeguards are appropriate.

Id., (citing McMillan, 477 U.S. at 84); Mullaney v. Wilbur, 421 U.S. 684, 698 (1975); Specht v. Patterson, 386 U.S. 605, 607 (1967).

In dissent, Judge Pregerson argued that the reasonable doubt standard should apply to the determination of sentence-enhancing facts. Id. at 663. (Pregerson, J., dissenting). According to Judge Pregerson, fourteen to eighteen months of the defendant's freedom turned on whether the government could establish his responsibility for the additional cocaine.

> When the government's power to deprive an individual of liberty or property turns on the correctness of a factual conclusion, due process protects the individual's stake in assuring that the determination is reliable and accurate. When the stakes are high, as they are when individuals stand to lose their freedom, we require a high degree of confidence that the disputed issues are determined reliably.

Id. See, In Re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (The function of the standard of proof, as embodied in the Due Process Clause, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.")

Also dissenting, Judge Norris engaged in a comprehensive analysis of the due process ramifications of the Guidelines. At the outset, he noted:

> The Guidelines provide us with a sentencing scheme that seems to be unprecedented in that it not only treats elements of a crime as sentencing factors, but also attaches mandatory penal consequences to proof of those facts.

Id. at 665. (Norris, J., dissenting). Noting that "[j]udicial fact-finding is substituted for judicial discretion as the currency of the new sentencing regime," id., Judge Norris argues: (1) that Congress intended to allow the government to prove certain elements of additional crimes at sentencing, but it did not intend that the government carry a lower burden of proof at sentencing than at trial; and (2) that the Guidelines create a liberty interest in a sentence within the relevant Guidelines range. Id. at 669.

In the instant case, Petitioner's charge of being a felon in possession of a weapon has been cross-referenced to attempted first degree murder based upon the Government's post-verdict proof of certain facts by a preponderance of the evidence, and the resulting sentencing range was lengthened by 9-11 years. Certainly, then, the finding of these facts has had a dramatic quantitative impact upon the sentence received by Petitioner. Yet the procedural protections afforded Petitioner en route to this compounded deprivation of his liberty were significantly lower than those which applied at his trial. In light of the ongoing debate among the Circuits as to the sufficiency of the preponderance standard in sentencing under the Guidelines, this Court should consider the due process ramifications of the application of the cross-referencing provisions of the Sentencing Guidelines in the instant case. Where, as here, there is an extreme disparity between the offense charged and the offense sentenced, "relevant conduct" should be proven pursuant to a standard which comports with the requirements of the Fifth and Sixth

Amendments, and promotes justice under law. See U.S. Const. Amend. V & VI.

II.

This Court should consider whether the law enforcement officers conducted a legitimate protective sweep of the premises at 828 Tyler Street, Gary, Indiana.

The record herein indicates that the burglary of the State Bank of Redwood occurred on July 12, 1992 in Redwood Falls, Minnesota. The burglar was a lone suspect, and no charges of conspiracy were lodged or prosecuted. On July 17, 1992, Petitioner was arrested at his residence at 828 Tyler Street in Gary, Indiana. (TR. III-375). At approximately 11:20 a.m. on the date of his arrest, Petitioner spoke (via telephone) with Agent Karen Pertuso. (Orders p. A-9). Shortly after that conversation, nine FBI agents went out to arrest Petitioner. As they approached 828 Tyler Street, the agents dispersed as follows: two agents set up positions on the north side of the home; two agents set up positions on the south side of the home; three agents were in the rear of the home; and two approached from the front. The record reveals that the agents were heavily armed with riot guns and automatic weapons.

When the agents announced themselves, Petitioner came to the front door and walked out onto the porch. He was neither armed nor completely dressed, and he peacefully submitted himself to arrest. (TR. III-384). Immediately upon arresting him, however, Agent Dunn and the other agents proceeded to conduct a "protective sweep" of the premises at 828 Tyler Street. At the trial, Agent Dunn testified:

Q. What happened next?

A. He was placed up against the exterior of the house, as I recall; was patted down, as I recall -- I wasn't primarily concerned with him at that time, because they had him. But I was concerned about the rest of the house and if, indeed, there were a possibility of any other danger within the house or nearby.

Q. So what did you do?

A. I went in with other agents, and we conducted what we would call a sweep, or protective sweep, or of the interior of the residence.

Q. What is the purpose of the protective sweep?

A. Well, the purpose is just that. The name implies exactly what it is, and that's to insure that there is no other individuals who have access to weapons or to provide an immediate menace or immediate threat to individuals, either be they the arresting people or individuals inside themselves.

Q. How long did your protective sweep take, approximately?

A. Approximately two, three, four, five minutes -- five minutes at most. It was a fairly small house, so I would have to say it was less than that.

(TR. III-438). Agent Dunn testified that he was able to go through the whole house in a relatively short period of time, and that he went from the front to the back of the house and viewed the basement. (TR. III-456).

The starting point for this Court's analysis of the propriety of the agents' protective sweep and subsequent search of the premises at 828 Tyler Street is the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and affects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. Indeed, "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, 445 U.S. 573, 586 (1980). As the Supreme Court has stated, "[W]e can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." Chimel v. California, 395 U.S. 752, 767 n.12 (1969). In a context factually similar to the instant case, moreover, the Supreme Court has held:

> A search may be incident to an arrest "only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." If a search of a house

> is to be upheld as incident to an arrest, that arrest must take place inside the house, not somewhere outside -- whether two blocks away, twenty feet away, or on the sidewalk near the front steps.

Vale v. Louisiana, 399 U.S. 30, 33-34 (1970). (internal citations omitted).[5]

More recently, however, the Supreme Court has held that a search warrant is not required for police officers to conduct a protective sweep of an arrestee's residence. Maryland v. Buie, 494 U.S. 325, 337 (1990).

> The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.

In Buie, the defendant was suspected of armed robbery, and "six or seven" police officers executed an arrest warrant at his house after two days of surveillance and prior telephonic verification of his presence at home. Id. at 328.

> Once inside, the officers fanned out through the first and second floors. Corporal James Rozar announced that he would "freeze" the basement so that no one could come up and

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[5] The defendant in Vale was arrested on his front steps and advised that the police were going to search his house. 399 U.S. at 33. During the search, a quantity of narcotics were found. Id. The Court concluded, however, that "no precedent of this Court can sustain the constitutional validity of the search in the case before us." Id.

> surprise the officers. With his service revolver drawn, Rozar twice shouted into the basement, ordering anyone down there to come out. When a voice asked who was calling, Rozar announced three times: "this is the police, show me your hands." Eventually, a pair of hands appeared around the bottom of the stairwell and Buie emerged from the basement. He was arrested, searched, and handcuffed by Rozar. Thereafter, Detective Joseph Frolich entered the basement "in case there was someone else" down there. He noticed a red running suit lying in plain view on a stack of clothing and seized it.

Id. (internal citations to transcript omitted). According to the Buie Court, the issue is "what level of justification the Fourth Amendment required before Detective Frolich could legally enter the basement to see if someone else was there." Id. at 330.

Considering the issue, the Buie Court determined that a search warrant was not a prerequisite for the protective sweep of the basement. Id. at 334. The Court held, however, "that there must be articulable facts which, taken together with the rational inferences from these facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id. The Court further emphasized:

> [S]uch a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces

> where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

Id. at 335-36. (emphasis added).

Under Buie, the protective sweep of the premises at 828 Tyler Street was illegitimate. First, the record clearly reveals that Petitioner was arrested on the porch rather than in the home. (TR. III-384). Unlike Buie, therefore, the protective sweep in the instant case did not occur "in conjunction with an in-home arrest." 494 U.S. at 337; see also United States v. United States District Court, 407 U.S. 297, 313 (1972) ("Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.") Second, the agents' sweep of 828 Tyler Street lasted up to five minutes longer than it took "to complete the arrest and depart the premises." (TR. III-438). Indeed, Agent Dunn stated that it was a "fairly small house." (TR. III-438). This statement calls into question whether the agents' five minute sweep can be properly characterized as "a cursory inspection of those spaces where a person may be found." 494 U.S. at 335.

Third, the record contains no "specific and articulable facts" supporting the agents' fear of attack from individuals within the premises. In his testimony, for example, Agent Dunn merely stated that he conducted the sweep "to insure that there is no other individuals who have access to weapons or to provide an immediate menace or immediate threat to individuals." (TR. III-438). Yet the suspected burglar had not acted in concert with others, and no charges of conspiracy were lodged or prosecuted.[6] Nor did Agent Dunn point to

[6] Buie involved an armed robbery committed by two men. 494 U.S. at 328.

were lodged or prosecuted.[6] Nor did Agent Dunn point to any specific information which he possessed at the time of the arrest which would lead a reasonable person to fear an attack by anyone other than Petitioner. As Justice Stevens observed in Buie, furthermore, the government has the burden of demonstrating not only that the officers have a reasonable basis for believing that someone in the premises might attack them or otherwise interfere with the arrest, but also that it would be safer to enter the house rather than simply to guard it from outside. 494 U.S. at 337. (Stevens, J., concurring). In this case, as in Buie, "[t]he fact that [Petitioner] offered no resistance when he emerged from the [premises] is somewhat inconsistent with the hypothesis that the danger of an attack by a hidden confederate persisted after the arrest." Id.[7] For these reasons, the protective sweep of Petitioner's residence was not justified per Buie.

The Court of Appeals nevertheless found that the sweep was valid pursuant to the Eighth Circuit decisions in United States v. Horne, 4 F.3d 579 (8th Cir. 1993), and United States v. Kaylor, 877 F.2d 658 (8th Cir.), cert. denied, 493 U.S. 871 (1989). Yet each of these cases is factually and legally distinguishable from the instant case. Horne, for instance, involved a sweep incident to an in-home arrest. 4 F.3d at 586. Furthermore, the Horne Court concluded that the search of the loveseat and chair "was valid as incident to the arrest." Id. See Chimel v. California, 395 U.S. 752, 763 (1969) (An

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[6] Buie involved an armed robbery committed by two men. 494 U.S. at 328.

[7] Additionally, "[i]f the officers actually feared an attack one would expect them to seek positions of safety." United States v. Bruton, 647 F.2d 818, 829 (8th Cir. 1981) (Lay, C.J., concurring and dissenting). Furthermore, the notion that a law enforcement agent would enter a residence "in sincere anticipation that a dangerous gunman was hiding inside" simply defies common sense. Id.

arresting officer may search the area within the immediate control of the person arrested, meaning the area from which he might gain possession of a weapon or destructible evidence.) Hence, the sweep in Horne had an independent legal justification that does not apply here. Likewise, Kaylor was a pre-Buie decision which also involved an in-home arrest. 877 F.2d at 660. Further, Kaylor involved a multiple arrest scenario in which the arresting officers were concerned about the possible destruction of evidence. Id. The Court found that "these exigent circumstances justified the sweep search." Id. at 664.

Due to these factual and legal differences, the Court of Appeals' reliance (in the instant case) upon Horne and Kaylor was misplaced, and this Court should consider whether the protective sweep of 828 Tyler Street was constitutionally legitimate.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit.

Dated this 9 th day of May, 1994.

TRAWICK & SMITH, P.A.

By: S/S

George H. Smith (#102404)
Attorney for Petitioner
Suite 1290
100 South Fifth Street
Minneapolis, MN 55402

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DOUGLAS JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-2071MN

United states of America,	*	
	*	
Appellee,	*	Appeal from the United States
	*	District Court for the
v.	*	District of Minnesota.
	*	
Douglas Johnson,	*	[UNPUBLISHED]
	*	
Appellant.	*	

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submitted: October 13, 1993
Filed: November 29, 1993

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

PER CURIAM.

Douglas Johnson appeals his convictions and sentences for aggravated bank burglary, use of a firearm during a crime of violence, and possession of a firearm by a felon. See 18 U.S.C. §§ 2113(a), (d); 924(c); 922(g) (1988). We affirm.

After responding to a bank's night alarm, an officer observed a man with a bag run in front of his squad car's headlights. The man ran around a building and when the

officer pursued, the man shot and wounded the officer. An intense investigation led the police to believe Johnson was the perpetrator. Johnson was residing in his sister's house and nine officers went there to arrest him. Johnson and his sister responded to the officers' knocks on the front door and Johnson surrendered. While officers were arresting Johnson on the porch, several other officers conducted a brief protective sweep inside the house to check for other persons who might pose a danger to the arresting officers. Officers then asked Johnson and his sister for permission to search the house. The officers informed Johnson that if he did not consent, they would try to get a search warrant. Johnson and his sister read and signed consent forms permitting the officers to search the house and the basement occupied by Johnson. During the search, officers seized evidence linking Johnson to the bank burglary and shooting.

First, Johnson contends the officers improperly searched the house under the pretext of a protective sweep. We disagree. "Officers may conduct a limited protective sweep of an arrestee's home following an in-home arrest if they have a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those at the arrest scene." United States v. Horne, 4 F.3d 579, 586 (8th Cir. 1993). Here, the officers arrested Johnson on the front porch of the house for bank burgling and shooting a police officer, potentially alerting an unknown number of others inside. Because Johnson was unarmed when the officers arrested him, the officers reasonably believed that someone inside the house was in a position to use the missing weapon against the officers. Thus, the officers properly conducted a protective sweep inside the house. See United States v. Kaylor, 877 F.2d 658, 664 (8th Cir.), cert. denied, 493 U.S. 871 (1989). Contrary to Johnson's view, the officers did not search beyond the scope of a protective sweep. The officers' sweep was limited to a quick room-to-room search

for persons who could endanger the officers. The officers discovered several persons but neither discovered nor seized any weapons or incriminating evidence during the procedure.

We also reject Johnson's related contention that his consent to search the house was not given voluntarily because he believed the police had already searched the house during the protective sweep. There is nothing in the record indicating Johnson believed the officers searched for evidence of the bank burglary and shooting during the protective sweep. Johnson was aware that if he withheld his consent, the officers would have to obtain a search warrant to reenter the house. Although Johnson was in custody, the officers did not threaten or pressure him to consent. Johnson read and understood the consent form, suggested some changes in the officers' entries, and signed the form. Considering the totality of the circumstances, we conclude the district court's finding that Johnson voluntarily consented to the search is not clearly erroneous. See United States v. Larson, 978 F.2d 1021, 1023-24 (8th Cir. 1992); see also United States v. Castillo, 866 F.2d 1071, 1081-82 (9th Cir. 1988) (upholding district court's finding that consent to search given after protective sweep was voluntary).

Johnson next contends that a photographic array shown to the wounded officer was impermissibly suggestive and tainted his in-court identification of Johnson. We agree with the district court, however, that the array was not impermissibly suggestive. The photos depict men with similar facial characteristics, and the officer was not told that Johnson was among the pictured men. See, e.g., United States v. Lewin, 900 F.2d 145, 148-49 (8th Cir. 1990) (telling identifying officers that photo spread contained photographs of defendants rendered process impermissibly suggestive). Even if the array was suggestive, we also agree with the district court that the officer's in-court identification was reliable. See id. (in-court identification following

impermissibly suggestive photo spread is nevertheless admissible if the identification is reliable). The officer had an adequate opportunity to view Johnson during Johnson's flight from the bank, the officer identified only Johnson's photo from the array, the officer was not told whether he had picked the defendant's photo, and the officer identified Johnson both in the array and in court with a high degree of certainty.

Finally, Johnson contends the district court misapplied the cross-reference provision of U.S.S.G. § 2K2.1 to his felon-in-possession of a firearm conviction. See U.S.S.G § 2K2.1(c)(1)(A) (Nov. 1992). According to Johnson, permitting the Government to prove the uncharged, cross-reference crime of attempted murder by only a preponderance of the evidence violated his Fifth and Sixth Amendment rights. Johnson's contention, however, is foreclosed by our decisions in United States v. Fleming, No. 92-3188, 1993 WL 417760, at *2 (8th Cir. Oct. 21, 1993) and United States v. Smith, 997 F.2d 396, 397 (8th Cir. 1993) (per curiam). Johnson also contends the state attempted murder statute rather than the federal statute, 18 U.S.C. § 1111, should be applied as the cross-reference crime. Contrary to Johnson's contention, the attempted murder guideline, § 2A2.1 comment. (n.2), provides for the application of the federal statute. Because the Government proved the attempted murder by a preponderance of the evidence, we conclude the district court properly applied § 2K2.1(c)(1)(A).

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

AO 245 S (Rev. 4/95) Sheet 1 - Judgment in a Criminal ...

A true copy of ___ sheet(s) of the record in my custody.
CERTIFIED ... 19...
Frances E. Dosal, Clerk
BY: ... Deputy Clerk

United States District Court

... District of Minnesota - Fourth Division

UNITED STATES OF AMERICA

V.

Douglas Johnson

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 4-92-143

George Smith

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) ...

☒ was found guilty on count(s) 1, 2, & 3 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 2113(a) & (d)	Aggravated bank burglary.		1
18 924(c)	Use of a firearm in a crime of violence.		2
18 922(g)	Felon in possession of a firearm.		3

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ... and is discharged as to such count(s).

☐ Count(s) ... (is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 150. for count(s) 1, 2, & 3, which shall be due ☒ immediately ☐ as follows.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: unknown

Defendant's Date of Birth: 7-3-72

Defendant's Mailing Address:

838 Tyler Street

Gary, Indiana

Defendant's Residence Address:

April 16, 1993

Date of Imposition of Sentence

Signature of Judicial Officer

Diana E. Murphy, U.S. District Judge

Name & Title of Judicial Officer

A5 April 16, 1993

FILED Date 4-27-93
FRANCES E. DOSAL, CLERK
ACTING CHIEF DEPUTY CLERK ...
COURT CLERK ...

AO 245 S (Rev. 4/90) Sheet 2 - Imprisonment

Defendant: Douglas Johnson
Case Number: 4-92-141

Judgment—Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 293 months on Ct. 1. On ct. 3, the deft. is committed to the custody of the Bureau of Prisons for imprisonment for a term of 60 months to be served consecutively to ct. 1. On ct. 3, defendant is committed to the custody of the Bureau of Prisons for imprisonment for a term of 120 months to run concurrently to ct. 1.

☐ The court makes the following recommendations to the Bureau of Prisons:

That the U.S. Penitentiary in Terre Haute, Indiana be designated as the defendant's place of incarceration. If that facility is not available, the court would recommend a facility near Gary, Indiana.

☒ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district:
- ☐ at _____ a.m. / p.m. on _____
- ☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____
- ☐ as notified by the United States marshal.
- ☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at

_____, with a certified copy of this judgment.

A6 _____
United States Marshal

By _____
Deputy Marshal

Defendant Douglas Johnson
Case Number 4-92-143

Judgment—Page 3 of 4

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

A7

Defendant: Douglas Johnson
Case Number: 4-92-143

RESTITUTION AND FORFEITURE

RESTITUTION

☒ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
State Bank of Redwood Redwood Falls, MN 56283	$708.45

Payments of restitution are to be made to:

☐ the United States Attorney for transfer to the payee(s).

☒ the payee(s).

Restitution shall be paid:

☒ in full immediately.

☐ in full not later than _____.

☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

☐ in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

☐ The defendant is ordered to forfeit the following property to the United States:

All

* U.S. GPO 1990-723-440-10000

Defendant: Douglas Johnson
Case Number: 4-92-143

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 35

Criminal History Category: VI

Imprisonment Range: 292 to 365 months

Supervised Release Range: 3 to 5 years

Fine Range: $ 15,000 to $ 150,000 (plus cost of incarceration or supervision)

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 208.45

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America,
Plaintiff, Crim. No. 4-92-143

v.

Douglas Johnson, SENTENCING MEMORANDUM
Defendant.

I. FINDINGS OF FACT

There being no objections to the factual statements contained in the presentence investigation report (PSI), the court adopts these statements as its findings of fact.

II. APPLICATION OF GUIDELINES TO FACTS:

The court adopts the conclusions as to the applicable guidelines contained in the PSI to which there are no objections. There are four disputes regarding the applicable guidelines.

Minimal Planning

Defendant argues that only $708.45 in loose change was missing from the bank and that there is no evidence that the offense involved more than minimal planning.

The government agrees with the position of the probation officer in the PSI.

Cross Reference to Assault with Intent to Commit Murder

Defendant argues that the felon in possession of a firearm count should not be cross referenced to assault with intent to commit murder under §2K2.1(c) (1). He asserts that the government has not proven that this cross reference is correct beyond a reasonable doubt.

The government argues that the cross reference provision of § 2K2.1(c) (1) is valid and that it only needs to prove this underlying conduct by a preponderance of the evidence. It asserts that defendant's shooting of the police officer in furtherance of the bank burgiary would have been felony murder if the officer had died and that therefore the cross reference to assault with intent to commit murder is correct. It also argues that the evidence presented at trial supports a finding of premeditation.

Criminal History

Defendant argues that the offense described in paragraphs 53 and 55 are the same types of charges and that he should receive one point instead of two points for the offense described in paragraph 55.

The government agrees with the position of the probation officer in the PSI.

Aggravated Assault

Defendant argues that if aggravated assault, §2A2.2(a), is used instead of assault with intent to commit murder under the cross reference, then the base aggravated

assault offense level should be enhanced only two points for the degree of injury.

The government responds that if aggravated assault is used, it should be enhanced by six points because the injured police officer was seriously injured and almost died.

The court resolves the questions as follows:

Minimal Planning

The defendant carried a gun when he entered the State Bank of Redwood which indicates that his planning for this offense was more than minimal.

Cross Reference to Assault with Intent to Commit Murder

The government needs to prove related conduct by a preponderance of the evidence. See, United States v. Townley, 929 F.2d 365, 370 (8th Cir. 1991). The guideline for attempted murder applies if the object of the offense would have constituted first degree murder as defined by 18 U.S.C. § 1111 (a) . If the police officer had died, defendant would have committed felony murder under 18 U.S.C. § 1111(a) and therefore, the cross-reference to assault with the intent to commit murder is correct. The evidence at trial also indicated that the defendant went around a corner, waited, and then fired at the police officer; this shows requisite intent for first degree murder.

Criminal History

The offense described in paragraph 55 receives two points because it was committed while the defendant was on probation. §4A1.1(b).

Aggravated Assault

The cross reference to assault with intent to commit murder is appropriate and therefore no finding on the level of injury for aggravated assault is necessary, but the police officer suffered permanent injuries and his life was threatened and a six point enhancement for injury would be appropriate.

The court determines that the applicable guidelines are:

Total Offense Level: 35

Criminal History Category: VI

292 to 365 months imprisonment

3 to 5 years supervised release

$15,000 to $150,000 fine (plus cost of imprisonment or supervision)

$708.45 restitution

$150 special assessment

III. IMPOSITION OF SENTENCE AND STATEMENT OF REASONS

Count I

Douglas Johnson, you have been charged in Count I of the indictment with aggravated bank burglary, in violation of Title 18, United States Code, section 2113(a) and (d).

Based upon the jury's verdict finding you guilty of that charge, it is considered and adjudged that you are guilty of that offense.

The court finds that the State Bank of Redwood is a victim of this crime and that the State Bank of Redwood has suffered a loss of approximately $708.45.

THEREFORE, IT IS ADJUDGED:

that on count I, you are committed to the custody of the Bureau of Prisons for imprisonment for a term of 292 months;

Count II

Douglas Johnson, you have been charged in Count II of the indictment with use of a firearm in a crime of violence, in violation of Title 18, United States Code, section 924(c).

Based upon the jury's verdict finding you guilty of that charge, it is considered and adjudged that you are guilty of that offense.

THEREFORE, IT IS ADJUDGED:

that on count II, you are committed to the custody of the Bureau of Prisons for imprisonment for a term of 60 months to be served consecutively to Counts I and III;

Count III

Douglas Johnson, you have been charged in Count III of the indictment with being a felon in possession of a firearm, in violation of Title 18, United States Code, section 922(a).

Based upon the jury's verdict finding you guilty of that charge, it is considered and adjudged that you are guilty of that offense.

THEREFORE, IT IS ADJUDGED:

that on count III, you are committed to the custody of the Bureau of Prisons for imprisonment for a term of 120 months to be served concurrently to Count I;

IT IS FURTHER ADJUDGED:

that pursuant to 18 U.S.C. § 3583, you are to serve a term of supervised release of 3 years, upon the following terms and conditions:

1. that you not commit any crimes, federal, state, or local;

2. that you abide by the standard conditions of supervised release recommended by the Sentencing Commission;

3. that you not possess any firearms or dangerous weapons;

that pursuant to 18 U.S.C. § 3663, you are to pay restitution in the amount of $708.45 to the State Bank of Redwood, Redwood Falls, Minnesota 56283.

that pursuant to 18 U.S.C. § 3013, you are to pay to the United States a Special Assessment of $150, due immediately.

Reasons for Placement within Guideline Range Exceeding 24 Months

The guideline range exceeds 24 months, and the court imposes a sentence of imprisonment at 292 months because defendant is a young man whose prior record contains nothing as serious as the conduct related to this offense and it does not appear that he set out to commit such a serious offense. The sentence selected is sufficient to meet all the goals of sentencing.

Fine

A fine is not imposed in this case because defendant is apparently unable to pay a fine due to his lack of assets and pending incarceration.

Date: 4/21/93

S/S

Diana E. Murphy
Chief Judge

2. FIREARMS

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(1) 26, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance Offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(2) 24, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or

(3) 22, if the defendant had one prior felony conviction of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(4) 20, if the defendant

(A) had one prior felony conviction of either a crime of violence or a controlled substance offense; or

(B) is a prohibited person, and the Offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(5) 18, if the offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(6) 14, if the defendant is a prohibited person; or

(7) 12, except as provided below; or

(8) 6, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f) or (m).

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

	Number of Firearms	Increase in Level
(A)	3-4	add 1
(B)	5-7	add 2
(C)	8-12	add 3
(D)	13-24	add 4
(E)	25-49	add 5
(F)	50 or more	add 6.

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition,

decrease the offense level determined above to level 6.

(3) If the offense involved a destructive device, increase by 2 levels.

(4) If any firearm was stolen, or had an altered or obliterated serial number, increase by 2 levels.

Provided, that the cumulative offense level determined above shall not exceed level 29.

(5) If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense; increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(6) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply --

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C §§ 922(a)-(p), (r), 924(a), (b), (e), (f), (g); 26 U.S.C § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. *"Firearm" includes (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer, or (iv) any destructive device. See 18 U.S.C § 921(a)(3).*

2. *"Ammunition" includes ammunition or cartridge cases, primer, bullets, or propellent powder designed for use in any firearm. See 18 U.S.C. § 921(a)(17)(A).*

3. *"Firearm listed in 26 U.S.C. § 5845(a)" includes: (i) any short-barreled rifle or shotgun or any weapon made therefrom; (ii) a machinegun; (iii) a silencer, (iv) a destructive device, or (v) any "other weapon," as that term is defined by 26 U.S.C § 5845(e). A firearm listed*

in 26 U.S.C § 5845(a) does not include unaltered handguns or regulation-length rifles or shotguns. For a more detailed definition, refer to 26 U.S.C § 5845.

4. *"Destructive device" is a type of firearm listed in 26 U.S.C § 5845(a), and includes any explosive, incendiary, or poison gas -- (i) bomb, (ii) grenade, (iii) rocket having a propellant charge* of *more than four ounces, (iv) missile* having *an explosive or incendiary charge* of *more than one-quarter ounce,* (v) *mine, or (vi) device similar to any* of *the devices described in the preceding clauses; any type of weapon which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter, or any combination of parts either designed or intended for use in converting any device into any destructive device listed above. For a more detailed definition, refer to 26 U.S.C. § 5845(f).*

5. *"Crime of violence," "controlled substance offense," and "prior felony conviction(s)," are defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1), subsections (1) and (2), and Application Note 3 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1), (a)(2), (a)(3), and (a)(4)(A), count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).*

6. *"Prohibited person," as used in subsections (a)(4)(B) and (a)(6), means anyone who: (i) is under indictment for, or has been convicted of, a "crime punishable by imprisonment for more than one year," as defined by 18 U.S.C. § 921(a)(20); (ii) is a fugitive from justice; (iii) is*

an unlawful user of, or is addicted to, any controlled substance; (iv) has been adjudicated as a mental defective or involuntarily committed to a mental institution; or (v) being an alien, is illegally or unlawfully in the United States.

7. *"Felony offense," as used in subsection (b)(5), means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.*

8. *Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.*

9. *For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.*

10. *Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include*

the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1) - (a)(5), subsection (b)(2) is not applicable.

11. *A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and a two-level enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.*

12. *If the defendant is convicted under 18 U.S.C. § 922(i), (j), or (k), or 26 U.S.C. § 5861(g) or (h) (offenses involving stolen firearms or ammunition), and is convicted of no other offense subject to this guideline, do not apply the adjustment in subsection (b)(4) because the base offense level itself takes such conduct into account.*

13. *Under subsection (b)(6), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).*

14. *Under subsection (c)(1), the offense level for the underlying offense (which may be a federal, state, or*

local offense) is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).

15. *Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

16. *An upward departure may be warranted in any of the following circumstances: (1) the number of firearms significantly exceeded fifty; (2) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ('plastic) firearms (defined at 18 U.S.C. § 922(p)); (3) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C § 921(a)(17)(B)); or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals.*

17. *A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal See §4B1.4.*

18. *As used in subsections (b)(5) and (c)(1), "another felony offense" and "another offense" refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure*

under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

19. *The enhancement under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number applies whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.*

Historical Note: Effective November 1,1987. Amended effective November 1,1989 (see Appendix C, amendment 189); November 1, 1990 (see Appendix C, amendment 333); November 1, 1991 (see Appendix C, amendment 374); November 1, 1992 (see Appendix C, amendment 471); November 1, 1993 (see Appendix C, amendment 478).

§2K2.2. [Deleted]

Historical Note: Section 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms), effective November 1, 1987, amended effective January 15, 1988 (see Appendix C, amendment 34), November 1, 1989 (see Appendix C, amendment 189), and November 1, 1990 (see Appendix C, amendment 333), was deleted by consolidation with §2K2.1 effective November 1, 1991 (see Appendix C, amendment 374).

§2K2.3. [Deleted]

Historical Note: Section 2K2.3 (Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense), effective November 1, 1989 (see Appendix C, amendment 189), was deleted by consolidation with §2K2.1 effective November 1, 1991 (see Appendix C, amendment 374). A former §2K2.3 (Prohibited Transactions in or Shipment of Firearms and Other Weapons), effective November 1, 1987, was

deleted by consolidation with §2K2.2 effective November 1, 1989 (see Appendix C, amendment 189).

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

(a) If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. § 844(h), § 924(c), or § 929(a), the term of imprisonment is that required by statute.

§6A1.2. Disclosure or Presentence Reports Issues in Dispute (Policy Statement)

Courts should adopt procedures to provide for the timely disclosure of the presentence report; the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute. See Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference (August 1987).

Commentary

Application Note:

1. *Under Rule 32, Fed.R.Crim. P., if file court intends to consider a sentence outside the applicable guideline range on a ground not identified as a ground for departure either in the presentence report or a pre-hearing submission, it shall provide reasonable notice that it is contemplating such ruling, specifically identifying the ground for the departure. Burns v. United States, 111 S. Ct. 2182 (1991).*

Background: In order to focus the issues prior to sentencing, the parties are required to respond to the presentence report and to identify any issues in dispute. The potential complexity of factors important to file sentencing determination normally requires that the position of the parties be presented in writing. However, because courts differ greatly with respect to their reliance on written plea agreements and with respect to file feasibility of written

statements under guidelines, district courts are encouraged to consider the approach that is most appropriate under local conditions. The Commission intends to reexamine this issue in light of experience under file guidelines.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 59); November 1, 1991 (see Appendix C, amendment 425).

§6A1.3. Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

Commentary

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly

specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979) cert. denied, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "'sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F. Supp. 751 (E.D. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978) cert. denied, 444 U.S. 1073 (1980). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be

considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971) cert. denied, 404 U.S. 1061 (1972).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 294); November 1, 1991 (see Appendix C, amendment 387).

UNITED STATES DISTRICT
COURT DISTRICT OF MINNESOTA
PROBATION OFFICE

GLENN BASKFIELD
Chief Probation Officer
426 U.S. Courthouse
110 South Fourth Street
Minneapolis, MN 55401-2295
612/348-1980

638 U.S. Courthouse
316 North Robert Street
St. Paul, MN 55101-1423
612/290-3937

Reply to: Minneapolis

February 1, 1993

George Smith, Esq.
Suite 1290
100 South Fifth Street
Minneapolis, MN 55402

Re: Douglas Johnson
Docket No. CR 4-92-143(01)

Dear Mr. Smith:

Enclosed please find revised pages 5 through 12 of the presentence report in regard to the above-named individual. The offense level computation section has been revised.

Sincerely,

Glenn Baskfield
Chief U. S. Probation Officer

S/S
Jay F. Meyer
U. S. Probation Officer

JFM/ej

Enclosure

cc: Margaret T. Burns, AUSA

Count One - Aggravated Bank Burglary

25. **Base Offense Level:** The guideline for a violation of 18 U.S.C. § 2113(a) (d) is found in §2B2.2 of the guidelines. The base offense level is 12. 12

26. **Specific Offense Characteristics:** Because the offense involved more than minimal planning, two levels are added. +2

27. Although a firearm was possessed, no increase is applicable because the presence of a firearm is sanctioned in the penalties of 18 U.S. C. § 924 (c) , which requires a five-year consecutive sentence. 0

28. **Victim Related Adjustments:** Because the defendant assaulted a law enforcement officer in a manner that created a substantial risk of serious bodily injury during the immediate flight from the burglary, three levels are added. +3

29. **Adjustment for Role in the Offense:** None. 0

30. **Adjustment for Obstruction of Justice:** None. 0

31. **Adjustment for Acceptance of Responsibility:** None 0

32. **Adjusted Offense Level, Count One (Subtotal):** 17

Count Three - Felon in Possession of a Firearm

33. **Base Offense Level:** The guideline for a violation of 18 U.S.C. § 922(a) is found in §2K2.1 of the guidelines. The base offense level is 20 under

§2K2.1(a) (4) because the defendant has one prior felony conviction for a crime of violence (Battery). 20

34. **Specific Offense Characteristics:** Because the defendant used the firearm in connection with another felony offense (Bank Burglary), four levels are added under §2K2.1 (b) (5). +4

35. Cross Reference: The provisions of §2K2.1(c) (1) instruct that if the defendant used or possessed any firearm in connection with commission or attempted commission of another offense, the guideline for that offense should be used if greater than that determined above. In this case, the defendant shot 11 rounds at police officer Derek Woodford and struck Officer Woodford 4 times. Therefore, §2A2.1, Assault with Intent to Commit Murder, is used. The base offense level is 28 under §2A2.1(a) (1) because the subject of the offense could have constituted first degree murder under the meaning of 18 U.S.C. § 1111 (a). 28

3 6. **Specific Offense Characteristics:** Because police officer Woodford sustained life-threatening bodily injury, four levels are added under §2A2.1(b) (A). +4

37. **Victim Related Adjustments:** Because the defendant assaulted a law enforcement officer in a manner that created a substantial risk of serious bodily injury during the immediate flight from the burglary, three levels are added. +3

38. Role in the Offense: None. 0

39. Adjustment for Obstruction of Justice: None. 0

40. Adjustment for Acceptance of Responsibility: None. 0

41. Adjusted Offense Level, Count Three (Subtotal): 35

	Multiple Count Adjustment	**Units**	
42.	Count Three Adjusted Offense Level	35	1
43.	Count Two Adjusted Offense Level	17	0
44.	Total Number of Units		1
45.	Greater of the Adjusted Offense Levels Above	35	
46.	Increase in Offense Level (See §3D1.4)		0
47.	Combined Adjusted Offense Level	35	35

48. Adjustment for Acceptance of Responsibility: 0

49. **Total Offense Level** 35

Count Two - Use of a Firearm in a Crime of Violence

50. **Base Offense Level:** The guideline for a violation of 18 U.S.C. § 924(c) is found in §2K2.4 of the Guidelines. According to §2K2.4(a), a term of imprisonment is that required by statute, which is a five-year consecutive imprisonment sentence.

PART B. DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

	Date of Arrest	Conviction/ Court	Date Sentence Imposed/Disposition	Guideline/ Points
51.	6-17-87 (age 14)	Commercial Burglary, East Chicago, Indiana	10/29/87: Probation	§4A1.2(d)(2)(B) 0
52.	8-26-87 (age 15)	Conversion, East Chicago, Indiana	12-17-87: Probation	§4A1.1(c) 1
53.	3-6-88 (age 15)	Commercial Burglary, East Chicago, Indiana	5-5-88: Committed to the Indiana Boys School.	§4A1.1(c) 1
54.	5-9-89 (age 15)	Resisting Law Enforcement, East Chicago, Indiana	6-26-89: Probation, 30 days juvenile center.	§4A1.1(c) 1
55.	8-24-89 (age 16)	Receiving Stolen Property, East Chicago, Indiana	12-18-89: Probation violated, Committed to the Indiana Boys School	§4A1.1(b) 2
56.	5-28-90 (age 16)	Receiving Stolen Auto Parts, East Chicago, Indiana	7-30-90: 30 days juvenile center.	§4A1.1(c) 1

Adult Convictions

Date of Arrest	Conviction/ Court	Date Sentence Imposed/Disposition	Guideline/ Points
57. 8-8-90 (age 18)	Auto Theft. Lake County District Court, Gary, Indiana	11-7-90: 18 months prison. Committed to the Indiana Department of Corrections.	§4A1.1(a) 3
58. 10-30-90 (age 18)	Battery, Lake County District Court, Gary, Indiana	7-3-91: 24 months prison, to run consecutively to sentence above: Committed to the Indiana Department of Corrections. 2-13-92: Released. 2-13-93: Parole expires.	§4A1.1(a) 3

The defendant got into a fight while detained at a county jail. The other inmate sustained a broken jaw.

Criminal History Computations	Points
59. The subtotal of the criminal convictions listed above is 12.	12
60. At the time the instant offense was committed, the defendant was serving a parole term in the state of Indiana from a sentence imposed on July 3, 1991. Pursuant to §4A1.1(d), two points are added.	2

61. The instant offense was committed less than two years following the defendant's release from custody on February 13, 1992, for the sentence of Battery which was imposed on July 30, 1991. Pursuant to §4A1.1(e), one point is added. 1

62. The total of the criminal history points is 15. According to the sentencing table (Chapter 5, Part A), 13 or more criminal history points establish a criminal history category of VI. 15

Other Criminal Conduct

63. None.

Pending Charges

64. None.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

65. The defendant, age 20, was born in East Chicago, Indiana, where he has resided all his life. He is one of five children born to Lucinda Johnson. The defendant's father, Ralph Johnson, died in 1973 as a result of a gunshot wound. Although the defendant was eight months old when his father died and has no memories of his father, he indicated in a psychological assessment conducted by the State of Indiana, that his father was shot because he was a drug abuser and a drug dealer. The defendant's mother died in 1990 at the age of 39 from what the defendant described as natural causes. He suspects her alcoholism may have led to her death.

66. The defendant has good memories from his childhood even though his father died when he was young and finances were difficult throughout his upbringing. Because of his mother's drinking, the defendant became independent at a young age and was the one to pay the rent and the bills every month. He and his sister were mainly responsible for cooking for the family which prepared him for independent living when he was 17 years old. At that age, he left his parental home and moved in with a girlfriend.

67. The defendant has five siblings. Mona Johnson, age 22, moved to Minneapolis in August 1992, with her three children. She relies on AFDC. Eric, age 19, lives in East Chicago, Indiana. Shalonda, age 17, and Maurice, age 9, live with their aunt, Rose Thornton, who is also their legal guardian. She lives in East Chicago, Indiana.

68. The defendant is the father of one child, Kiara Protho, age 3, whom he last saw in April 1992. Kiara is reportedly in foster care through the Lake County Welfare Department. Her mother, Robin Protho, age 19, was previously incarcerated on a charge of Assault and Battery.

Physical Condition

69. The defendant stands 5'10" tall, weighs 150 pounds, and has brown eyes and black hair. He reports no history of hospitalization or medical problems.

Mental and Emotional Health

70. The defendant describes his mental health as normal and states that he has not had any type of personal counseling.

71. In August 1991, the defendant underwent a psychological evaluation through the Indiana Department of Corrections. Psychologist Mary Wollitz Dooley conducted the evaluation which included the Minnesota Multi-Personality Inventory (MMPI) . The psychological evaluation was arranged after the defendant was convicted of Battery.

72. The defendant's MMPI was valid. According to the evaluation, "his profile fits with some of the behaviors that were expressed in the interview. He gets into trouble but does not know adequately how to learn from his experience. He does not have the skills for analyzing his behavior choices or how his thoughts and feelings influence those so he ends up reactive and impulsive and does not learn from the consequences of his behavior. He does not anticipate appropriately how his behavior affects others or what price he may have to pay for it. Until he learns to do this kind of self-examination and personal change, he is likely to end up back in the system."

73. The evaluation further indicated that "he is bright enough to be able to develop those skills if someone is capable of establishing a kind of guidance alliance with him that could help him with that learning. our assessing would indicate that he clearly has the mental abilities to complete a GED or get a high school diploma if he can stay motivated to do so.

Substance Abuse

74. The defendant remembers that he first drank beer and felt under the influence when he was three years old. He described how his mother let the children drink beer on their birthdays. He states that he started to drink with friends when he was 15 years old, but that his use of alcohol has only been social. He admits that he frowns on excessive drinking and drug use because he saw how it led to his parents' deaths.

Education and Vocational Skills

75. The defendant was enrolled in the public school system in East Chicago, Indiana. He completed the eighth grade, but later obtained a GED on November 22, 1991, while an inmate with the Indiana Department of Corrections.

Employment

76. The defendant has no employment history.

Financial Condition: Ability to Pay

77. The defendant has no assets, liabilities, monthly income, or monthly expenses.

PART D. SENTENCING OPTIONS

Custody

78. **Statutory Provisions:** For Count One the maximum term of imprisonment is 25 years. 18 U.S. C § 2113(a) (d).

79. Count Two requires a 5-year term of imprisonment to be served consecutively to any other sentence. 18 U.S.C. § 924(c).

80. Count Three authorizes a maximum term of imprisonment of 10 years. 18 U.S.C. § 922(g).

81. **Guideline Provisions:** Based on a total offense level of 35 and a criminal history category of VI, the guideline range for imprisonment is 292 to 365 months.

Impact of the Plea Agreement

82. There was a trial by jury in this case and, therefore, no plea agreement.

Supervised Release

83. **Statutory Provisions:** If a term of imprisonment is imposed for the Count One offense, a term of supervised release of not more than three years may also be imposed. is U.S.C. § 3583(b) (2). If a term of imprisonment is imposed for the Count Two offense, a term of supervised release of not more than three years may also be imposed. 18 U.S.C. § 3583(b) (3). For Count Three, a term of supervised release of not more than three years may also be imposed. 18 U.S.C. § 3583(b) (2).

84. **Guideline Provisions:** The guideline range for a term of supervised release is at least two years but not more than three years. §5E1.2(b) (2)

Probation

85. **Statutory Provisions:** For Counts One and Three, the defendant is eligible for not less than one year nor more than five years probation by statute. 18 U.S.C. § 3561(b)(1). For Count Two, the defendant is not eligible for probation because the statute requires a term of imprisonment. 18 U.S.C. §924(c).

86. **Guideline Provisions:** Because the minimum of the guideline range is greater than six months, the defendant is not eligible for probation. §5B1.1(a) (2).

Fines

87. **Statutory Provisions:** The maximum fine is $250,000 for each count. 18 U.S.C. § 3571(B) (3).

88. **A** special assessment of $50 is mandatory on each of the three counts. 18 U.S.C. § 3013.

89. **Guideline Provisions:** The fine range for the instant offense is from $15,000 to $150,000. §5E1.2(c)(3).

90. Subject to the defendant's ability to pay, the Court must impose an additional fine that is at least sufficient to pay the cost of any imprisonment, probation, or supervised release ordered. §5E1.2(i). The most recent advisory from the Administrative Office of the U. S. Courts, dated August 7, 1991, suggests that a monthly cost of $1,492.00 be used for imprisonment, a monthly cost of $991.00 be used for community confinement, and a monthly cost of $115.30 be used for supervision.

Restitution

91. The State Bank of Redwood experienced a total loss of $708.45. Restitution payments can be sent to:

State Bank of Redwood
Redwood Falls, Minnesota 56283
Attention: Thomas A. Hollatz

PART E. FACTORS THAT MAY WARRANT DEPARTURE

92. The probation officer has not identified any factors that would warrant a departure from the guideline range.

Respectfully submitted,

S/S

Jay F. Meyer
U. S. Probation Officer

APPROVED: S/S
Glenn Baskfield
Chief U.S. Probation Officer

JFM/ej

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
)ss:
COUNTY OF HENNEPIN)

Marci A. Pikula, of the City of Minneapolis, County of Hennepin, in the State of Minnesota, being duly sworn, says that on the 9th day of May, 1994, she served the annexed:

PETITION FOR WRIT OF CERTIORARI

upon Margaret T. Burns, Esq., by mailing to the above-named attorney, two copies thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota, directed to said attorney at Assistant U.S. Attorney, 234 U.S. Courthouse, 110 South 4th Street, Minneapolis, MN 55402, the last known address of said attorney.

S/S
Marci A. Pikula

Subscribed and sworn to before me
this 9th day of May, 1994.

S/S
Notary Public

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-2071MNMI

United States of America,	*	
	*	
Appelle,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
Douglas Johnson,	*	
	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 7, 1994

Order Entered at the Direction of the Court:

S/S
Clerk, U.S. Court of Appeals, Eighth Circuit